

1 THE HONORABLE RICHARD A. JONES

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4  
5 UNITED STATES DISTRICT COURT  
6 FOR THE WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 PATRICK NJOROGÉ,

9 Plaintiff,

10 v.

11 VOCATIONAL TRAINING  
12 INSTITUTES, INC. d/b/a PIMA  
13 MEDICAL INSTITUTE, an Arizona  
corporation,

14 Defendant.

No. 2:16-cv-00951-RAJ

ORDER

15 This matter comes before the Court on Defendant Pima Medical Institute's  
16 ("Defendant" or "Pima") Motion for Summary Judgment of Plaintiff's claims. Dkt.  
17 # 22. Plaintiff Patrick Njoroge opposes the Motion. Dkt. # 25. For the reasons  
18 stated below, Defendant's Motion is **GRANTED in part** and **DENIED in part**.

19 **I. BACKGROUND**

20 **A. Defendant's Motion to Strike Plaintiff's Declaration**

21 As a preliminary matter, Defendant argues that Plaintiff alleges facts in his  
22 Response that do not meet the requirements of Federal Rule of Civil Procedure  
23 56(c). Several of the factual assertions in Plaintiff's Response are only supported by  
24 Plaintiff's own declaration. Dkt. # 23. Rule 56(c) requires that factual positions in a  
25 motion for summary judgment be supported by citations to part of the record,  
26 including affidavits or declarations. These affidavits or declarations must be "made  
27 on personal knowledge, set out facts that would be admissible in evidence, and show

1 that the affiant or declarant is competent to testify on the matters stated.” Fed. R.  
2 Civ. P. 56(c).

3 Contrary to Defendant’s assertion, several of the facts alleged in Plaintiff’s  
4 declaration appear to be based on his personal knowledge and alleged experiences,  
5 not on information from others. Defendant also argues that Plaintiff’s declaration  
6 cannot be the basis to create a material issue of fact because several of the alleged  
7 facts conflict with Plaintiff’s deposition testimony, were not testified to in his  
8 deposition, and conflict with Dr. Corsilles-Sy’s declaration. By asking the Court to  
9 determine the truth of Plaintiff’s declaration through comparison to his deposition  
10 testimony and Dr. Corsilles-Sy’s declaration, Defendant is asking the Court to make  
11 a credibility determination. “In resolving summary judgment motions, a court must  
12 not weigh the evidence, make credibility determinations, or draw inferences from  
13 the facts adverse to the non-moving party.” *His & Her Corp. v. Shake-N-Go*  
14 *Fashion, Inc.*, 572 F. App’x 517, 518 (9th Cir. 2014); *Anderson v. Liberty Lobby,*  
15 *Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (“Credibility  
16 determinations, the weighing of the evidence, and the drawing of legitimate  
17 inferences from the facts are jury functions, not those of a judge, whether he is  
18 ruling on a motion for summary judgment or for a directed verdict.”); *see also*  
19 *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1149 (9th Cir. 2002). As  
20 Plaintiff’s credibility is more appropriately considered at trial, the Court declines to  
21 make that determination here.

22 Defendant also argues that Plaintiff’s declaration must be struck because it is  
23 based on inadmissible hearsay. Plaintiff relies on several statements he alleges were  
24 made by Pima instructors and other personnel. Defendant argues that Plaintiff must  
25 lay a foundation in order to rely on statements made by Pima personnel as  
26 statements of a party opponent. However, “[t]o survive summary judgment, a party  
27 does not necessarily have to produce evidence in a form that would be admissible at

1 trial, as long as the party satisfies the requirements of Federal Rules of Civil  
2 Procedure 56.” *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001).  
3 The Court makes no judgment on whether Plaintiff will be able to lay a foundation  
4 for these statements at trial, but will consider statements that meet the requirements  
5 of Rule 56 for the purposes of this Motion. To the extent that Plaintiff’s declaration  
6 is based on inadmissible hearsay, it will not be considered for the purposes of this  
7 Motion.

8 Finally, Defendant requests that the Court strike any speculative and  
9 conclusory allegations not supported by the record. To the extent that Plaintiff’s  
10 declaration makes any speculative or conclusory allegations, it will not be  
11 considered here.

12 B. Plaintiff’s Academic History

13 Plaintiff, Patrick Njoroge, is black and originally from Kenya. Dkt. # 1 ¶ 3.1.  
14 He is a resident of King County, Washington. *Id.* at ¶ 2.1. Pima is a medical career  
15 college that is incorporated in Arizona but conducts business in King County,  
16 Washington. Dkt. # 23 Ex. A. In Fall of 2012, Plaintiff enrolled in the Occupational  
17 Therapy Assistant (“OTA”) program at Pima. Dkt. # 25. At this time, Plaintiff  
18 completed an Enrollment Agreement. Dkt. # 23 Ex. C. The Enrollment Agreement  
19 stated Pima’s tuition refund policy. *Id.* Under this policy, Pima retains 100% of  
20 enrollment period charges if Plaintiff withdraws or is terminated from the program  
21 during “greater than 50% through or through the remainder of the enrollment  
22 period.” Dkt. # 23 Exs. C, J

23 According to the policies and procedures of the OTA program, failure of  
24 three or more courses may result in termination from the program. Dkt. # 23 Ex. F.  
25 If a student fails an OTA designated course, the student may retake the course one  
26 time. *Id.* Failure of that course a second time results in termination from the OTA  
27 program. *Id.* If a student is terminated from the OTA program, that student can

1 apply to re-enroll in the program. *Id.* After re-enrollment, failure of an OTA  
2 designated course will result in termination from the OTA program. *Id.* At that  
3 time, the student may not be eligible for another re-enrollment. *Id.*

4 At some point after Plaintiff began classes at Pima, he submitted an essay  
5 about his heritage titled, “Kikuyu Culture”. Dkt. # 26. Plaintiff alleges that after he  
6 submitted his essay, instructors at Pima began treating him differently. *Id.* During  
7 Plaintiff’s first term, he failed three OTA designated courses and was withdrawn  
8 from the program. Dkt. # 23 Ex. H; Dkt. # 23 Ex. E. Plaintiff testified in his  
9 deposition that he failed these courses due to illness. Dkt. # 23 Ex. E. Plaintiff  
10 made no claims of discrimination at that time. In May 2013, Plaintiff was permitted  
11 to re-enroll in the OTA program to retake the three courses he initially failed. Dkt. #  
12 23 Ex. I. At the time of re-enrollment, Plaintiff executed another Enrollment  
13 Agreement. Dkt. # 23 Ex. J. During this second enrollment, Plaintiff passed the  
14 courses he failed during his first term. *Id.*

15 During the third term of Plaintiff’s second enrollment at Pima, Plaintiff failed  
16 another course. *Id.*; Dkt. # 25. Plaintiff testified that he failed the class because he  
17 was “emotionally disturbed” because his mother was sick. Dkt. # 23 Ex. E. On May  
18 23, 2014, Plaintiff met with the OTA program director, Dr. Cecille Corsilles-Sy.  
19 During that meeting, Dr. Corsilles-Sy informed Plaintiff that he was terminated from  
20 the OTA program because he failed four courses. *Id.* On May 27, 2014, Plaintiff  
21 appealed his termination from the OTA program. *Id.* In his appeal letter, Plaintiff  
22 stated his belief that, according to Pima policies, he should be given the opportunity  
23 to retake his failed fourth course. Plaintiff’s letter also included a quote from the  
24 affirmative action policy in the Pima Medical Institute Catalogue, but did not  
25 contain any specific allegations of discrimination. Dkt # 23 Ex. K.

26 On June 12, 2014, Plaintiff met with a panel regarding his appeal. During the  
27 hearing, Plaintiff was asked whether he felt discriminated against. Plaintiff stated

1 that he felt discriminated against because Dr. Corsilles-Sy terminated him without  
2 giving him another opportunity to continue with the program. Dkt. # 23 Ex. E.  
3 Plaintiff stated in his deposition that he believed he had “three chances for the whole  
4 program,” or, of the total number of semesters for the OTA program, Plaintiff had  
5 three opportunities to pass all of his courses. *Id.* After this hearing, Plaintiff was  
6 allowed to repeat the course that he failed. Dkt. # 23 Ex. L. Plaintiff retook his  
7 failed course in June 2014, and began his Fall 2014 term in September 2014. Dkt. #  
8 23 Ex. H.

9 In Defendant’s notes from the hearing, there is a handwritten note that states,  
10 “[n]eed a statement from Student on what or how he found discrimination in the  
11 OTA or PD decision to terminate.” *Id.* The notes are signed by Kristi Shimada,  
12 Associate Director at Pima, and Dr. Corsilles-Sy. *Id.* After the panel hearing, Ms.  
13 Shimada prepared a written statement regarding Plaintiff’s discrimination claims.  
14 Dkt. # 22. The statement reads, in part: “I spoke to Patrick regarding his reference.  
15 He does not feel that the OTA program has discriminated against him according to  
16 the Affirmative Action statement. He wanted to reiterate that Pima Medical Institute  
17 policy complied with the Affirmative Action Act.” Dkt. # 22; Dkt. # 24 Ex. M.  
18 On June 18, 2014, Plaintiff signed the statement. *Id.*

19 On September 29, 2014, Plaintiff received an email from Karen St. Charles,  
20 one of his instructors, informing him that Fall 2014 term classes had begun and that  
21 she noted that he was not in class. Dkt. # 26 Ex. B. Plaintiff alleges that he spoke to  
22 Ms. St. Charles the next day and explained that he missed his first class because he  
23 did not receive any information about his class schedule. Plaintiff also alleges that  
24 Ms. St. Charles indicated that Plaintiff’s name was not in the system and assured  
25 him that his absence the day before would not be “counted against him”. Dkt. # 26 ¶  
26 19. During Plaintiff’s Fall 2014 term, he alleges that he spoke to instructors in three  
27 of his courses about his grades, which were posted on Pima’s internal online system:

1 Ms. Keith, Ms. Loi, and Ms. Keeny. Dkt. # 26. Plaintiff believed that these grades  
2 were incorrectly noted. On all three occasions, Plaintiff alleges that the instructors  
3 somehow attributed his incorrect grades to Dr. Corsilles-Sy, either because she  
4 would not change a grade, or because she was the person who entered the grade into  
5 the system. Dkt. # 26.

6 On December 15, 2014, Plaintiff alleges that he spoke to Campus Director,  
7 Bob Panerio, and explained that his grades were incorrectly posted, that after  
8 bringing these errors to the attention of his instructors they began giving his  
9 assignments below-average grades, and that Ms. Keeny told him that he lacked  
10 critical thinking because English was his second language. Dkt. # 26. Plaintiff  
11 further alleges that Mr. Panerio then told Plaintiff that he wanted to investigate these  
12 claims. *Id.* The following month, Plaintiff followed-up with Mr. Panerio. Mr.  
13 Panerio allegedly told Plaintiff, “It looks you have a problem with Dr. Corsilles-Sy  
14 Cecilles.” *Id.* After this conversation Mr. Panerio did not speak to Plaintiff about  
15 this matter again. *Id.*

16 On February 9, 2015, Plaintiff received an email from Dr. Corsilles-Sy,  
17 stating that he was terminated from the OTA program because he received failing  
18 grades in two more courses during his Fall 2014 term. Dkt. # 23 Ex. N. After  
19 receiving this information, Plaintiff met with Ms. Shimada, Dr. Corsilles-Sy, and the  
20 instructors of those two courses. Dkt. # 23 Ex. E. At this meeting, one of Plaintiff’s  
21 instructors, Ms. Keith, realized that she had made a grading error on one of  
22 Plaintiff’s papers. After Ms. Keith regraded Plaintiff’s paper, he received a passing  
23 grade in that course. *Id.* After Plaintiff’s grades were adjusted, he still had a failing  
24 grade in one of his courses, Pediatrics, and his termination from the OTA program  
25 was upheld. *Id.*

26 On June 22, 2016, Plaintiff filed a Complaint against Defendant for race  
27 discrimination, retaliation, violation of the Equal Protection Clause of the Fourteenth

1 Amendment, and other state law claims. Dkt. # 1.

## 2 **II. LEGAL STANDARD**

3 Summary judgment is appropriate if there is no genuine dispute as to any  
4 material fact and the moving party is entitled to judgment as a matter of law.  
5 Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating  
6 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
7 317, 323 (1986). Where the moving party will have the burden of proof at trial, it  
8 must affirmatively demonstrate that no reasonable trier of fact could find other than  
9 for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).  
10 On an issue where the nonmoving party will bear the burden of proof at trial, the  
11 moving party can prevail merely by pointing out to the district court that there is an  
12 absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477  
13 U.S. at 325. If the moving party meets the initial burden, the opposing party must  
14 set forth specific facts showing that there is a genuine issue of fact for trial in order  
15 to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).  
16 The court must view the evidence in the light most favorable to the nonmoving party  
17 and draw all reasonable inferences in that party's favor. *Reeves v. Sanderson*  
18 *Plumbing Prods.*, 530 U.S. 133, 150-51 (2000). Credibility determinations and the  
19 weighing of the evidence are jury functions, not those of a judge. *Anderson*, 477  
20 U.S. at 255.

21 However, the court need not, and will not, "scour the record in search of a  
22 genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996);  
23 *see also, White v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the  
24 court need not "speculate on which portion of the record the nonmoving party relies,  
25 nor is it obliged to wade through and search the entire record for some specific facts  
26 that might support the nonmoving party's claim"). The opposing party must present  
27 significant and probative evidence to support its claim or defense. *Intel Corp. v.*

1 *Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

2 Uncorroborated allegations and “self-serving testimony” will not create a genuine  
3 issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th  
4 Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors Ass’n*, 809 F. 2d 626, 630 (9th  
5 Cir. 1987).

### 6 **III. DISCUSSION**

#### 7 **A. Race Discrimination in Violation of State and Federal Law**

8 Title VI provides that “[n]o person in the United States shall, on the ground  
9 of race, color, or national origin, be excluded from participation in, be denied the  
10 benefits of, or be subjected to discrimination under any program or activity receiving  
11 Federal financial assistance.” 42 U.S.C. § 2000d. “Title VI prohibits only  
12 intentional discrimination.” *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).  
13 Washington’s Law Against Discrimination (“WLAD”) prohibits discrimination in  
14 public accommodation, on the basis of race or national origin. Public  
15 accommodation includes any place where the sale of goods, merchandise, services,  
16 or personal property is transacted. RCW 49.60.030.

#### 17 **1. Disparate Treatment**

18 The Court analyzes Plaintiff’s Title VI and state law disparate treatment claims  
19 under the same burden shifting framework established in *McDonnell Douglas Corp.*  
20 *v. Green*, 411 U.S. 792 (1973). *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th  
21 Cir. 2014) (“We now join the other circuits in concluding that *McDonnell Douglas*  
22 also applies to Title VI disparate treatment claims.”); *Spry v. Peninsula Sch. Dist.*, 193  
23 Wash. App. 1015 (2016) (applying the *McDonnell Douglas* shifting framework to  
24 WLAD claims). To satisfy his burden on the race discrimination claims, a plaintiff  
25 must establish a prima facie case of racial discrimination. *McDonnell Douglas Corp.*,  
26 411 U.S. at 802.

27 “The requisite degree of proof necessary to establish a prima facie case . . . on



summary judgment is *minimal* and does not even need to rise to the level of a preponderance of the evidence.” *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 659 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). To avoid summary judgment, however, plaintiffs “must do more than establish a prima facie case and deny the credibility of the [defendant’s] witnesses.” *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994). Plaintiffs must produce “specific, substantial evidence of pretext.” *Id.*

If a plaintiff successfully establishes a prima facie case for race discrimination, the burden of production shifts to the defendant to show a legitimate, non-discriminatory reason for its action. *McDonnell Douglas Corp.*, 411 U.S. at 802. The burden then shifts back to the plaintiff to show that the defendant’s reasons were pre-textual. *Id.* at 804. Despite this burden shifting, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated remains at all times with the plaintiff. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000); *Norris v. City of San Francisco*, 900 F.2d 1326, 1329 (9th Cir. 1990).

*a. Federal Disparate Treatment Claim*

Under Title VI, unlawful discrimination is presumed if the plaintiff can show that: (1) he belongs to a protected class; (2) he was performing according to the Defendant’s legitimate expectations; (3) he suffered an adverse action; and (4) other students similarly situated were treated more favorably. *McDonnell Douglas Corp.*, 411 U.S. at 802; *see Darensburg v. Metropolitan Transp. Com’n*, 636 F.3d 511, 519 (9th Cir. 2011) (“We look to Title VII disparate impact analysis in analyzing Title VI claims.”). However, the Ninth Circuit has recognized that a plaintiff attempting to establish a prima facie case of discrimination “must offer evidence that ‘give[s] rise to an inference of unlawful discrimination,’ **either** through the framework set forth in *McDonnell Douglas Corp. v. Green* **or** with direct or circumstantial

evidence of discriminatory intent.” *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003), *as amended* (Jan. 2, 2004) (citations omitted) (emphasis added); *see Rashdan*, 764 F.3d at 1183. Evidence of discriminatory motive can be direct or indirect. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). “Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.” *Rashdan*, 764 F.3d at 1182 (9th Cir. 2014) (quoting *Vasquez v. Cnty. of L.A.*, 349 F.3d 634, 640 (9th Cir. 2003)).

Plaintiff offers several factual allegations as evidence of Defendant’s discriminatory intent. Plaintiff alleges that instructors at Pima treated him in a “cold and hostile manner” after he submitted his essay on Kikuyu culture in 2012<sup>1</sup>. Plaintiff also alleges that Ms. Keeny told him that he lacked critical thinking because English was his second language, that Dr. Corsilles-Sy told him that he should be an English as a Second Language (“ESL”) student in a mocking manner, and that Dr. Corsilles-Sy purposely recorded his grades incorrectly so that he would be terminated from the OTA program. Ms. Keeny was the instructor in two of the courses that Plaintiff failed and Plaintiff alleges that she made grading errors in at least one of those courses. Both failing grades contributed to both of Plaintiff’s terminations from the OTA program in 2014 and 2015. The comments made by Ms. Keeny and Dr. Corsilles-Sy support an inference of discriminatory animus, and both instructors were allegedly responsible for the errors in Plaintiff’s grades. Plaintiff carries only a minimal burden to establish his prima facie case, “a burden that does not even rise to the level of a preponderance of the evidence.” *Aragon*, 292 F.3d at 659. Plaintiff has met that burden.

i. Legitimate, Nondiscriminatory Reason and Pretext

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<sup>1</sup> Plaintiff includes Dr. Corsilles-Sy among the instructors that responded negatively to his essay. However, Defendant argues that Dr. Corsilles-Sy did not begin working at Pima until one year after Plaintiff submitted his essay on Kikuyu culture and that she was not aware of the existence of this essay until after Plaintiff filed this lawsuit. Dkt. # 27; Dkt. # 29.

1 As Plaintiff has established a prima facie case for race discrimination, the  
2 Court will now consider whether Defendant can articulate a legitimate,  
3 nondiscriminatory reason for terminating Plaintiff from the program. Defendant's  
4 burden at this stage is one of production, not persuasion. *Chuang v. Univ. of*  
5 *California Davis, Bd. of Trustees*, 225 F.3d 1115, 1123–24 (9th Cir. 2000).

6 Defendant argues that Plaintiff was terminated from the OTA program for  
7 poor academic performance. Defendant produced pages from Pima's catalog, the  
8 OTA student handbook detailing, and the OTA Program catalog detailing Pima's  
9 policy and procedures, Plaintiff's two Enrollment Agreements, excerpts from  
10 Plaintiff's deposition, a copy of Plaintiff's transcript, an email exchange regarding  
11 Plaintiff's changed grades, as well as a copy of a Professional Performance Pink Slip  
12 that Plaintiff received for plagiarism. Dkt. # 23 Exs. B, C, E, F, G, H, J, O, and P.  
13 As noted above, OTA program policy states that failure of three or more courses  
14 may result in termination from the program. Dkt. # 23 Ex. F. If a student is  
15 terminated from the OTA program, that student can apply to re-enroll in the  
16 program. *Id.* After re-enrollment, failure of an OTA designated course will result in  
17 termination from the OTA program. *Id.* At that time, the student may not be  
18 eligible for another re-enrollment. *Id.*

19 It is undisputed that Plaintiff failed three OTA designated courses during his  
20 first semester at Pima. Dkt. # 23 Ex. H. Plaintiff then withdrew from the program  
21 and re-enrolled. It is also undisputed that Plaintiff failed a fourth OTA designated  
22 course after that re-enrollment. *Id.* Plaintiff does not allege that these four failing  
23 grades are incorrect. Dkt. ## 25, 26. Setting aside the disputed fifth failed course,  
24 Pediatrics, that led to Plaintiff's second termination, according to OTA policy,  
25 Plaintiff's academic record provided grounds for termination from the OTA  
26 program. Even if Plaintiff's failing grade in Pediatrics was calculated incorrectly,  
27 Plaintiff failed "three or more courses" and was terminated for it. Defendant has

1 met its burden to show a legitimate, nondiscriminatory reason for terminating  
2 Plaintiff from the program.

3 Plaintiff carries the ultimate burden of persuasion to establish that  
4 Defendant's proffered reason for terminating Plaintiff was merely pretext for a  
5 decision that was actually based on racial animus. *St. Mary's Honor Ctr. v. Hicks*,  
6 509 U.S. 502, 507–08 (1993). Plaintiff has not met this burden. Plaintiff argues that  
7 Dr. Corsilles-Sy was intentionally altering his grades in order to terminate him from  
8 the program and that his eventual termination was based on two of those incorrectly  
9 entered or calculated grades. Plaintiff provides no evidence, other than his  
10 declaration, to support his theory that his termination was based on racial animus.

11 In addition to Plaintiff's declaration, he submitted his transcript, emails from  
12 Ms. St. Charles indicating that he was not present at the first day of class and listing  
13 his classes for the semester, an email from Dr. Corsilles-Sy notifying Plaintiff of his  
14 2015 termination, an email from Yukari Tojo noting that Plaintiff's grades would be  
15 adjusted, an email from Dr. Corsilles-Sy detailing Plaintiff's adjusted grades, and the  
16 syllabus from Plaintiff's Pediatrics class. Dkt. # 26 Exs. A-G. None of these  
17 documents provide the "specific and substantial" evidence required to overcome  
18 Defendant's proffered reason for Plaintiff's termination. *Aragon*, 292 F.3d at 659.  
19 At most, the provided evidence supports the contention that his grades were  
20 incorrectly calculated and corrected. Although Plaintiff's declaration states that  
21 these incorrectly calculated grades were intentional and evidence of racial  
22 discrimination, this declaration falls short of the substantial evidence required to  
23 establish pretext. Other than his subjective interpretation of OTA policy, Plaintiff  
24 provides no rebuttal for Defendant's argument that they had legitimate grounds for  
25 his termination prior to any alleged incorrect grades. This interpretation is not  
26 supported by evidence. Accordingly, the Court **GRANTS** Defendant's Motion with  
27 regard to Plaintiff's Title VI race discrimination claim.

1  
2 *b. State Law Disparate Treatment Claim*

3 To establish a prima facie showing of race or national origin discrimination in  
4 public accommodation under Washington state law, a plaintiff must show: 1) the  
5 plaintiff is a member of a protected class; 2) the defendant's establishment is a place  
6 of public accommodation; 3) the defendant discriminated against plaintiff by not  
7 treating him in a manner comparable to the treatment it provides to persons outside  
8 that class; and 4) the protected status was a substantial factor causing the  
9 discrimination. *Demelash v. Ross Stores, Inc.*, 105 Wash. App. 508, 525, 20 P.3d  
10 447, 456 (2001). The parties do not dispute whether Pima is a place of public  
11 accommodation and Plaintiff is clearly a member of a protected class. At issue is  
12 whether Defendant treated Plaintiff in a manner comparable to the treatment it  
13 provided students outside of his protected class, and whether Plaintiff's protected  
14 status was a substantial factor causing the discrimination.

15 Plaintiff provides no evidence and no argument that he was treated differently  
16 than any other similarly situated student. Plaintiff does not make any allegations  
17 regarding any other students in his Complaint, and provides only conclusory  
18 arguments in his Response. None of the evidence submitted by Plaintiff supports  
19 any claim that he was treated differently from any other student. Plaintiff merely  
20 states that he was "treated differently than others" and argues that the alleged  
21 comments made by Dr. Corsilles-Sy and Ms. Keeny about his English language  
22 skills and critical thinking provide proof that he was treated differently. Dkt. # 25.  
23 These arguments do not meet even the minimal level of evidence required to  
24 establish a prima facie case of discrimination. Even if Plaintiff could show that  
25 Defendant did not treat him in a manner comparable to the treatment it provided to  
26 persons outside of his protected class, he did not show that his protected status was a  
27 substantial factor causing the discrimination.

1 Plaintiff argues that he first began experiencing discrimination after he  
2 submitted an essay on Kikuyu culture. As noted above, Dr. Corsilles-Sy stated in  
3 her declaration that she did not begin working at Pima until one year after Plaintiff's  
4 essay was submitted, and was unaware of this essay until Plaintiff filed this lawsuit.  
5 Other than the comments made by Dr. Corsilles-Sy and Ms. Keeny, there is no other  
6 evidence that any alleged discrimination was due to Plaintiff's race or national  
7 origin. These comments, while offensive, are not sufficient to establish that  
8 Plaintiff's protected status was a substantial factor in causing Dr. Corsilles-Sy or Ms.  
9 Keeny to give him an undeserved failing grade or to manipulate his grades in any  
10 way. Defendant's Motion as to Plaintiff's WLAD disparate treatment claim is  
11 **GRANTED.**

## 12 2. *Hostile Educational Environment*

13 To establish a hostile educational environment claim under Title VI, Plaintiff  
14 must show that: (1) there was a racially hostile environment; (2) the school had  
15 notice of the problem; and (3) the school failed to respond adequately to redress the  
16 racially hostile environment. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d  
17 1022, 1033 (9th Cir. 1998). A "racially hostile environment" is "one in which racial  
18 harassment is severe, pervasive or persistent so as to interfere with or limit the  
19 ability of an individual to participate in or benefit from the services, activities or  
20 privileges provided by the recipient." *Id.* (citation omitted). Summary judgment of a  
21 hostile educational environment claim is appropriate if the plaintiff fails to raise a  
22 triable dispute as to whether defendant created a racially hostile environment or had  
23 any discriminatory intent. *Nkwuo v. Angel*, 693 F. App'x 696, 697 (9th Cir. 2017).

24 Plaintiff alleges that he was subject to a racially hostile educational  
25 environment, but offers little evidence to show that he was subject to racial  
26 harassment so "severe, pervasive or persistent" that it interfered with his ability to  
27 participate in or benefit in his education. Plaintiff claims that his essay on Kikuyu

1 culture caused “fury” and “hostility” among the instructors in the OTA program.  
2 However, he does not offer any evidence of this hostility or any details of any  
3 harassment that occurred after he submitted his essay and the main actor that he  
4 accuses of harassment, Dr. Corsilles-Sy, was not aware of this essay at the time the  
5 alleged harassment occurred. Plaintiff also alleges that Dr. Corsilles-Sy and Ms.  
6 Keene made racially offensive comments to him. However, two comments are not  
7 sufficient to establish that Plaintiff was subject to a racially hostile environment.  
8 Plaintiff was unable to recall any other statements he believed were inappropriate  
9 due to his race and/or national at his deposition, and makes no further allegations of  
10 offensive comments in his Response, declaration, or Complaint. Dkt. ## 1, 25, 26;  
11 Dkt. # 23 Ex. E. In fact, Plaintiff specifically states that he is not claiming that any  
12 other instructors other than Dr. Corsilles-Sy and Ms. Keeny were hostile to him.  
13 Dkt. # 25 at 22. Plaintiff fails to raise an issue of triable dispute as to whether  
14 Defendant created a racially hostile educational environment. To the extent that  
15 Plaintiff alleges a hostile educational environment claim under Title VI, Defendant’s  
16 Motion is **GRANTED**.

17 **B. Retaliation in Violation of State and Federal Law**

18 To establish a prima facie claim for retaliation under Title VI, Plaintiff must  
19 show: (1) he engaged in a statutorily protected activity, (2) defendant took some  
20 adverse action against him, and (3) there is a causal connection between the  
21 protected activity and the adverse action. *Peters v. Jenney*, 327 F.3d 307, 320 (4th  
22 Cir. 2003). The WLAD prohibits retaliation for engaging in a protected activity.  
23 RCW 49.60.210. Washington courts look to federal law when analyzing WLAD  
24 retaliation claims. *See Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th  
25 Cir. 2002).

26 Plaintiff claims that he engaged in statutorily protected activity when he filed  
27 an appeal from his May 2014 termination. Plaintiff cited to Pima’s affirmative

1 action policy in his appeal letter and stated that he felt discriminated against during  
2 his appeal hearing. Defendant does not dispute that Plaintiff engaged in a statutorily  
3 protected activity and was subject to an adverse action. Defendant only disputes  
4 whether there is a causal link between Plaintiff's complaints of discrimination and  
5 his final termination in February 2015 because of the length of time that passed  
6 between the events. From the time Plaintiff filed his appeal to his final termination  
7 from the OTA program, Plaintiff alleges that he was subject to several grading errors  
8 and that these grading errors eventually led to his termination. When Plaintiff was  
9 terminated in 2015, Dr. Corsilles-Sy informed him that he received failing grades in  
10 two courses. One or more errors were discovered in Plaintiff's grades and at least  
11 one of his failing grades was adjusted. Dkt. # 23 Ex. O. After adjustments were  
12 made to Plaintiff's grades, he still had a failing grade in one course, Pediatrics, and  
13 his termination remained in effect. *Id.*

14 Plaintiff argues that these grading errors were in retaliation for his appeal and  
15 claims of discrimination. Specifically, Plaintiff argues that his remaining failing  
16 grade was due to an intentional error made in order to terminate him from the  
17 program. Plaintiff received a "zero" on one of his "reflection papers" in Pediatrics.  
18 According to Plaintiff, his grade in Pediatrics was supposed to be calculated as  
19 follows: "tests/quizzes as twenty percent, lab skills at twenty five percent,  
20 homework as thirty percent, PPS as ten percent and final exam as fifteen percent."  
21 Dkt. # 26. Plaintiff contends that his reflection paper grade was purposely weighted  
22 incorrectly, and when weighted correctly, he would no longer have a failing grade in  
23 Pediatrics. Dkt. # 25.

24 In support of these contentions, Plaintiff cites to the Pediatrics syllabus. The  
25 syllabus details what actions would result in deductions, including situations where  
26 there were assignments required for participation in labs: "In cases where the  
27 assignment is not ready for presentation for lab, the student will receive 50% off of



1 his or her lab score for not presenting during lab in addition to the 50% deduction for  
2 the assignment itself.” Dkt. # 26 Ex.G. Defendant notes in passing that Plaintiff’s  
3 reflection paper grade carried over to the related lab skills grade, but provides no  
4 clear explanation as to the grading structure in this particular course. Dkt. # 22 at 8.  
5 It is possible that Plaintiff’s paper was related to a lab, but there is no clear  
6 indication what assignments are considered as “lab skills” assignments. The  
7 syllabus and the grade breakdown for Plaintiff’s final grade in Pediatrics list the  
8 paper in question as homework, however neither document explains how the  
9 assignments and classwork were weighted or how Plaintiff’s final grade was  
10 calculated. Dkt. # 23 Ex. P; Dkt. # 26 Ex. G. Plaintiff has shown that there is a  
11 genuine issue of material fact as to the casual connection between Plaintiff’s  
12 statutorily protected activity and his termination from the OTA program. Therefore,  
13 Defendant’s Motion for Summary Judgment is **DENIED** as to Plaintiff’s federal and  
14 state law retaliation claim.

15 C. Breach of Contract

16 Plaintiff brings a breach of contract claim against Defendant for failing to  
17 provide him educational services, grade him fairly, and abide by its own policies.  
18 Dkt. 1. Under Washington state law, contract may be oral or written, and may be  
19 implied. *Hoglund v. Meeks*, 139 Wash.App. 854, 870, 170 P.3d 37 (2007). Parties  
20 must “objectively manifest their mutual assent and the terms assented to must be  
21 sufficiently definite.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash.2d 171,  
22 177–78, 94 P.3d 945 (2004). The party asserting the existence of a contract bears  
23 the burden of proving each essential element, including the existence of a mutual  
24 intention. *Becker v. Washington State Univ.*, 165 Wash. App. 235, 246 (2011). It is  
25 “generally accepted that the relationship between a student and a university is  
26 primarily contractual in nature.” *Marquez v. Univ. of Washington*, 32 Wash. App.  
27 302, 305 (1982). The nature and terms of this type of agreement are usually implied,

1 with specific terms to be found in university publications. *Id.* “[T]he standard is  
2 that of reasonable expectations—what meaning the party making the manifestation  
3 ... should reasonably expect the other party to give it.” *Id.* at 306; *Becker*, 165  
4 Wash. App. at 246–47.

5 It is reasonable for Plaintiff to expect that Defendant provide him with an  
6 education in accordance with the policies and procedures outlined in Pima’s catalog.  
7 Dkt. # 23 Ex. B. Plaintiff alleges that Defendant violated its policy “not to  
8 discriminate against any person on the basis of race, color, religion, creed, national  
9 origin, sex, age, marital or parental status or disability in all of its educational and  
10 employment programs and activities, its policies, practices and procedures.” Dkt. #  
11 23 Ex. B. Plaintiff also argues that he was graded unfairly due to discrimination. As  
12 noted above, Plaintiff fails to establish that Defendant discriminated against him  
13 either through disparate treatment, or through a hostile educational environment.  
14 Neither can Plaintiff show that Defendant was in violation of its policies and  
15 procedures with regards to his termination. Plaintiff argues that he was terminated  
16 in violation of OTA program policy, but this argument is based on his subjective  
17 interpretation of that policy, and not on the policy itself. Defendant had adequate  
18 grounds to terminate Plaintiff in accordance with its policies and procedures.  
19 Plaintiff fails to establish a genuine issue of material fact as to whether Defendant  
20 breached any contract, thus, Defendant’s Motion for Summary Judgment is  
21 **GRANTED** as to Plaintiff’s breach of contract claim.

22 D. Unjust Enrichment

23 Plaintiff also claims that Defendant was unjustly enriched by his tuition  
24 payment because it failed to grade him fairly and give him an education in return for  
25 that tuition. To establish unjust enrichment, Plaintiff must show that: (1) one party  
26 conferred a benefit to the other; (2) the party receiving the benefit had knowledge of  
27 that benefit; and (3) the party receiving the benefit accepted or retained the benefit

1 under circumstances that make it inequitable for the receiving party to retain the  
2 benefit without paying its value. *Cox v. O'Brien*, 150 Wn. App. 24, 37 (2009). The  
3 parties do not dispute the existence of the first two elements of this claim. Plaintiff  
4 conferred a benefit to Defendant in the form of his tuition payment, and Defendant  
5 was aware of this benefit. At issue is whether it is inequitable for Defendant to  
6 retain that tuition payment because of Defendant's alleged discriminatory conduct  
7 and because Plaintiff alleges that he did not receive that education.

8 Plaintiff signed two Enrollment Agreements during his tenure at Pima. These  
9 Enrollment Agreements state Defendant's refund policy. According to this policy,  
10 Defendant retains 100% of enrollment period charges if Plaintiff withdraws or is  
11 terminated from the program during "greater than 50% through or through the  
12 remainder of the enrollment period." Dkt. # 23 Exs. C, J. Defendant argues that  
13 Plaintiff was properly terminated from the OTA program in accordance with its  
14 policies and procedures. Plaintiff does not specifically allege that the grades leading  
15 to his first termination were incorrect and it is undisputed that Plaintiff received at  
16 least four failing grades. Plaintiff provides no factual basis for his argument that this  
17 policy should not apply to him because he does not believe he should have been  
18 terminated. While Plaintiff did not receive his degree, he did complete the majority  
19 of the OTW program and he did receive an education. As there is no issue of  
20 material fact as to whether Defendant was unjustly enriched by Plaintiff's tuition  
21 payments, Defendant's Motion for Summary Judgment as to Plaintiff's unjust  
22 enrichment claim is **GRANTED**.

23 E. Consumer Protection Act

24 To establish a claim under the Washington Consumer Protection Act ("CPA"),  
25 Plaintiff must show: (1) an unfair or deceptive act or practice; (2) occurring in trade  
26 or commerce; (3) affecting the public interest; (4) injury to a person's business or  
27 property; and (5) causation. *Panag v. Farmers Ins. Co. of Washington*, 166 Wash. 2d

1 27, 37, 204 P.3d 885, 889 (2009). Plaintiff alleges that Defendant's marketing  
2 material is deceptive because it promised that Pima would provide Defendant with  
3 "high quality services" but failed to do so and that the material would be misleading  
4 to others in addition to Defendant. While Plaintiff alleges that Defendant treated him  
5 unfairly and did not provide him with the advertised services, he does not allege, and  
6 provides no evidence that Defendant failed to provide these services to other students.  
7 For Defendant's marketing material to be deceptive to other people besides Plaintiff,  
8 Plaintiff would need to show that actions complained of had any potential for  
9 repetition. *See Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 603  
10 (1984). Plaintiff argues in his Response that "a violation of the Washington Law  
11 Against Discrimination occurring in the course of trade or commerce that caused  
12 injury to business or property is also a violation of the CPA." Plaintiff cites to no  
13 legal authority that supports this proposition and offers no factual support or further  
14 explanation for his statements. Defendant's Motion for Summary Judgment as to  
15 Plaintiff's CPA claim is **GRANTED**.

16 F. Negligence

17 To establish a cause of action for negligence, Plaintiff must demonstrate that:  
18 (1) Defendant owed Plaintiff a duty; (2) Defendant breached that duty; (3) damages  
19 resulted; and (4) Defendant's breach proximately caused the damages. *Tincani v.*  
20 *Inland Empire Zoological Soc'y*, 124 Wash.2d 121, 127-28 (1994). The threshold  
21 determination of whether the defendant owes a duty to the plaintiff is a question of  
22 law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 220 (1991). Plaintiff  
23 argues that Defendant breached its duty to protect him from "reasonably anticipated  
24 or foreseeable dangers/harms" by failing to design and implement effective anti-  
25 harassment policies and practices, to discipline staff that engage in harassment or  
26 discrimination, to properly investigate Plaintiff's claims, and to "put an end to the  
27 hostile educational environment and harassment of Plaintiff." Dkt. # 1.

1 Plaintiff provides no further explanation or factual support for his argument  
2 that Defendant breached its duty to Plaintiff. While Plaintiff alleges in his  
3 Complaint that Defendant failed to design and implement effective anti-harassment  
4 policies and practices, Plaintiff provides no evidence regarding Defendant's current  
5 anti-harassment policies and practices, if any, no evidence regarding the  
6 effectiveness of those policies and practices, and no explanation how Defendant's  
7 alleged failure to design effective anti-harassment policies constituted a breach of  
8 Defendant's duty to Plaintiff. Plaintiff also provides no factual basis for his claim  
9 that Defendant did not properly investigate his claims. Plaintiff notes that Mr.  
10 Penerio did not follow-up with Plaintiff after their December 2014 meeting, but does  
11 not provide any evidence that Mr. Penerio did not actually investigate Plaintiff's  
12 claims, or that Dr. Corsilles-Sy or Plaintiff's other instructors were not properly  
13 disciplined for engaging in alleged harassment. Plaintiff does not provide sufficient  
14 factual basis for his claim of negligence. Therefore, Defendant's Motion for  
15 Summary Judgment of Plaintiff's negligence claim is **GRANTED**.

16 G. Outrage and Negligent or Intentional Infliction of Emotional Distress

17 Under Washington law, in order to state a claim of outrage, Plaintiff must show  
18 extreme and outrageous conduct and intentional or reckless infliction of emotional  
19 distress. *Stoot v. City of Everett*, 582 F.3d 910, 930 (9th Cir. 2009). Plaintiff must  
20 demonstrate conduct "so outrageous in character, and so extreme in degree, as to go  
21 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly  
22 intolerable in a civilized society." *Jensen v. GTE Nw., Inc.*, 7 F. App'x 778 (9th Cir.  
23 2001). None of the factual allegations brought by Plaintiff rise to the level of "extreme  
24 and outrageous conduct" or "intentional or reckless infliction of emotional distress".  
25 Plaintiff makes a cursory mention in his Complaint that Defendant's conduct caused  
26 severe emotional distress that manifested in "physical problems" but does not detail  
27 what these problems were, any details regarding his emotional distress, or how that

1 emotional distress led to physical problems. Dkt. # 1 ¶ 4.23.

2 Plaintiff's claim of negligent infliction of emotional distress also fails. "A  
3 plaintiff may recover on a claim for negligent infliction of emotional distress by  
4 proving negligent conduct, which consists of the familiar elements of duty, breach,  
5 proximate cause, and harm, as well as that the resulting emotional distress is (1) within  
6 the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given  
7 the circumstances, and (3) manifest by objective symptomatology." *Vargas Ramirez*  
8 *v. United States*, 93 F. Supp. 3d 1207, 1235–36 (W.D. Wash. 2015); *Kumar v. Gate*  
9 *Gourmet Inc.*, 180 Wash.2d 481, 325 P.3d 193, 205 (2014). As with Plaintiff's claims  
10 of intentional infliction of emotional distress and outrage, Plaintiff alleges that he  
11 suffered from physical manifestations of emotional distress. Plaintiff provides no  
12 evidence of "objective symptomology". Even viewing the evidence in a light most  
13 favorable to Plaintiff, there is no evidence to support Plaintiff's claims and Plaintiff  
14 fails to show that there is a question of material fact. Thus, Defendant's Motion for  
15 Summary Judgment as to Plaintiff's claims of outrage, intentional infliction of  
16 emotional distress, and negligent infliction of emotional distress is **GRANTED**.

17 H. Equal Protection Claims

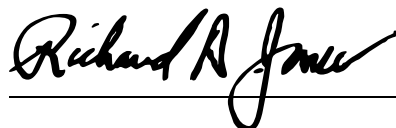
18 Plaintiff's § 1983 claims alleging violations of equal protection and Title VI  
19 require similar proofs. Plaintiff must show that actions of Defendant had a  
20 discriminatory impact, and that Defendant acted with an intent or purpose to  
21 discriminate based upon Plaintiff's membership in a protected class. *Lee v. City of*  
22 *Los Angeles*, 250 F.3d 668, 686–87 (9th Cir. 2001); *The Comm. Concerning Cmty.*  
23 *Improvement v. City of Modesto*, 583 F.3d 690, 702–03 (9th Cir. 2009). Plaintiff  
24 alleges that Defendant demonstrated a "deliberate indifference to the racial  
25 discrimination they have perpetuated through their actions," and that he was denied  
26 the right to equal opportunity to participate in his education due to racial  
27 discrimination.

1 Plaintiff failed to respond to Defendant's Motion for summary judgment of this  
2 claim. Plaintiff's Complaint provides no factual allegations in support of this claim.  
3 Instead, Plaintiff makes conclusory statements that Defendant violated his  
4 "constitutionally protected rights to receive the same treatment as other races" and  
5 "demonstrated a deliberate indifference to the racial discrimination they have  
6 perpetuated through their actions". Plaintiff provides no arguments or evidence to  
7 support these allegations and the Court will not "scour the record in search of a  
8 genuine issue of triable fact." *Keenan*, 91 F.3d at 1279 (9th Cir. 1996); *see also*, *White*  
9 *v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not  
10 "speculate on which portion of the record the nonmoving party relies, nor is it obliged  
11 to wade through and search the entire record for some specific facts that might support  
12 the nonmoving party's claim"). Plaintiff fails to establish a triable issue of fact with  
13 regards to his equal protection claim, thus Defendant's Motion for Summary  
14 Judgment is **GRANTED** as to Plaintiff's equal protection claim.

#### 15 IV. CONCLUSION

16 For the foregoing reasons, the Court **GRANTS** Defendant's Motion for  
17 Summary Judgment with regards to Plaintiff's claims of federal and state race  
18 discrimination claims, equal protection, breach of contract, unjust enrichment,  
19 consumer protection, intentional infliction of emotional distress, negligent infliction  
20 of emotional distress, negligence, and outrage. Defendant's Motion is **DENIED** as  
21 to Plaintiff's federal and state retaliation claims. Dkt. # 22.

22 Dated this 19th day of October, 2017.

23  
24  
25 

26 The Honorable Richard A. Jones  
27 United States District Judge